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Supreme Court, U.S.
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No. 02-0602

In The

Supreme Court of the United States

BRANDON HAYNES,

Petitioner,

versus

BURL CAIN, WARDEN
LOUISIANA STATE PENITENTIARY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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STATEMENT OF FACTS

On October 26, 1993, Petitioner, Brandon Haynes, left his home in Shreveport, Louisiana, near midnight and went to LSU Medical Center (LSU-MC). Haynes was employed as an insulation helper on a construction job at the Biomedical Center, which was connected to the medical center. After speaking to a boiler room attendant, Haynes went upstairs where he was captured on one of a series of cameras designed to provide security in an area where animal research was performed. Sometime after this he encountered the victim, Fang Yang, a graduate student at the medical school, who was working on an experiment related to her studies. Haynes forced her to the roof of the Biomedical Center. Once there, he cut her with a knife, robbed her, raped her vaginally and anally and killed her by means of a fall off the roof, ten stories down to her death.

Ms. Yang's body was found the next morning by construction workers at LSU-MC.

Haynes was linked to the offense by a video tape from the aforementioned camera. His grandfather, an insulation worker, identified him when Shreveport Police detectives showed the surveillance tape to various construction supervisors. The previous night, Haynes had turned off all cameras on the animal research floor, save for one. Additional inculpatory evidence included a positive identification by the boiler room attendant; the discovery of Ms. Yang's wallet, concealed in a wall in Haynes' home; human blood found on the seat of Haynes' car and his pants; a series of superficial wounds to Ms. Yang's neck and slash wounds to her chin, bruises on her arms consistent with grabbing and holding, and a DNA match between rape kit

samples taken from the victim's vagina and rectum and blood drawn from Haynes.

The sole factual issue in the guilt phase was how the killing occurred and therefore whether or not Haynes acted with the specific intent to kill or inflict great bodily harm. Haynes objected after opening statement to his trial counsel's tactic of conceding his guilt in kidnapping, robbing and raping Ms. Yang, while yet vigorously maintaining there was no specific intent to kill or inflict great bodily harm.

The State contended that Haynes forced or threw Ms. Yang off the roof, while the defense argued that other reasonable possibilities, such as the victim's fall being caused by her stumbling, running, jumping, or pulling away from Haynes during a struggle, were not excluded beyond a reasonable doubt by the evidence. The jury found Haynes guilty as charged of first-degree murder, but was unable to render a verdict in the penalty phase, thus he was sentenced to life imprisonment at hard labor without benefit of parole, probation or suspension of sentence.

STATEMENT OF THE CASE

Petitioner Brandon Haynes was tried for the first degree murder of medical student Fang Yang. Under Louisiana Revised Statutes (La.R.S.) 14:30.A.(1), the homicide was first-degree murder because it was an intentional killing committed during the perpetration of second-degree kidnapping, aggravated rape and armed robbery. Haynes was convicted of first-degree murder but, the jury being unable to agree on a sentence, a sentence of life imprisonment without benefit of probation, parole or

suspension of sentence was imposed. Louisiana Code of Criminal Procedure (La.C.Cr.P.) Article 905.8.

On appeal to the Louisiana Second Circuit Court of Appeal Haynes filed a *pro se* brief complaining that his defense counsel were ineffective because they conceded his partial guilt during the opening statement over Haynes' recorded protests, citing *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). The Second Circuit Court of Appeal affirmed the conviction, finding defense counsel was not ineffective, applying *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *State v. Haynes*, No. 27,499 (La.App.2d Cir. 11/1/95) 662 So.2d 849, writ den. 95-2768 (La. 2/16/96), 667 So.2d 1050.

Although Haynes' defense counsel filed an application for writs of review with the Louisiana Supreme Court, Haynes did not, and so the issue of ineffectiveness of his defense counsel was not presented to the Louisiana Supreme Court at that time. Following the Louisiana Supreme Court's writ denial on the appeal, Haynes filed an application for post-conviction relief in the Louisiana First Judicial District Court, raising the issue of ineffective defense counsel. The First Judicial District Court, in a well-reasoned opinion, denied Haynes' application, specifically finding that trial counsel employed an effective tactic to save Haynes from the death penalty. (Exhibits Vol. 7, pp. 1604-1606.)

Haynes then filed his first application for writ of habeas corpus in the United States District Court for the Western District of Louisiana. (CV No. 98-1125) This first application was dismissed without prejudice for failure to exhaust state court remedies.

Haynes then filed a writ application with the Louisiana Supreme Court, which denied relief. *State ex rel. Haynes v. State*, 99-0468 (La. 7/2/99) 747 So.2d 11. Haynes refiled his application for federal writs of habeas corpus. Magistrate Judge Roy Payne's Report and Recommendation, like the state courts, applied the *Strickland* standard, and found that Haynes' trial counsel were not ineffective.

Haynes filed an objection to the Report and Recommendation, and Judge Donald Walters appointed counsel to assist Haynes. On July 7, 2000, the United States District Court for the Western District of Louisiana filed its Memorandum Ruling finding that Haynes' trial counsel were ineffective under *Cronic*. The State was granted its appeal from the District Court's ruling.

The Fifth Circuit panel affirmed the action of the District Court by a two to one majority, Judge Politz and Judge Pro Tempore Kazen voting to affirm and Judge Emilio M. Garza dissenting in favor of reversal. *Haynes v. Cain*, 272 F.3d 757 (5th Cir. 2001). The State filed for rehearing *en banc*, which was granted. *Haynes v. Cain*, 284 F.3d 604, (5th Cir. 2002). The full court reversed the grant of habeas corpus, finding that the district court had failed to apply the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) standard of due deference to the state courts' findings that *Strickland v. Washington*, and not *Cronic*, applied. The Fifth Circuit also noted that the recent Supreme Court case of *Bell v. Cone*, ___ U.S. ___, 122 S.Ct. 1843, 1850, 152 L.Ed.2d 914 (2002), clarified that, for *Cronic* to apply, defense counsel's failure to subject the prosecution's case to adversarial testing must be complete. The Fifth Circuit found that the state court's opinion was not contrary to or an unreasonable application of *Strickland* in denying petitioner's claim. AEDPA (28

U.S.C. § 2254), *Haynes v. Cain*, 298 F.3d 375, 383 (5th Cir. 2002).

REASONS FOR DENYING THE WRIT

I. FAILURE TO EXHAUST STATE COURT REMEDIES: PETITIONER RAISED NEW CLAIMS AT THE FIFTH CIRCUIT COURT OF APPEALS

Although Petitioner steadfastly maintained his claim that he received ineffective assistance of counsel under *Cronic* from the earliest phase of his *pro se* state post-conviction relief, the instant application for certiorari presents a claim raised for the first time in the United States Court of Appeals for the Fifth Circuit, that being that Petitioner was denied his right to self-representation under *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Petitioner also claimed for the first time that the actions of his trial counsel constituted a forced guilty plea. These claims were not exhausted in the state courts, and were not even raised in the District Court in Petitioner's application for writs of habeas corpus.

It now appears that Petitioner has completely abandoned the original basis for his state post-conviction and federal habeas claims in favor of these new claims. To grant review on this new claim would be to ignore the principles of comity, finality and federalism which form the basis for the principles of habeas review embodied in AEDPA. *Williams v. Taylor,* 529 U.S. 420, 436, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000).

"The exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999); *Duncan v. Walker*, 533 U.S. 167, 179, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001). Petitioner has failed to raise in state court the factual basis now urged in defense, that is the alleged consent of the victim, as well as the argument that *Faretta* requires either a pre-trial colloquy before defense counsel will be permitted to make any tactical concessions, or that a defendant may force his trial counsel to follow a doomed and unethical strategy. Similarly, petitioner's claim that his trial counsel's strategy constituted a plea of guilty has been waived by his failure to raise it in state court or even in federal court until the case reached the Court of Appeals. *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 2565, 115 L.Ed.2d 640 (1991).

These claims are in themselves without merit and the consideration of these claims for the first time on appeal in a habeas action is in violation of the rules of comity as well as the specific dictates of AEDPA. *Williams v. Taylor*, supra. As the time period for state post-conviction relief has expired, these claims are procedurally barred in state court and so should not be considered on federal habeas review. La. C.Cr.P. Art. 930.8; *Coleman*, supra.

A party may not raise an issue for the first time on appeal. Although there may be a certain amount of fluidity in how issues evolve on appeal, a litigant cannot convert his claim into an entirely new and moving target. This is usually classified as a failure to exhaust state court remedies, warranting a dismissal at the district court level. *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71

L.Ed.2d 379 (1982), *O'Sullivan v. Boerckel*, supra. In this instance, the claim now urged as the basis for the writ of certiorari was not even raised at the district court level. Haynes never raised the *Faretta* or forced guilty plea claims, and the State submits that these issues have been waived by failure to exhaust state court remedies.

On habeas review federal courts must respect the autonomy of state courts by requiring that petitioners advance in state court all grounds for relief, as well as all factual allegations supporting those grounds. The exception is for a prisoner who can show cause and prejudice. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11-12, 112 S.Ct. 1715, 1721, 118 L.Ed.2d 318 (1992). No showing of cause and prejudice has been made, or even attempted, for Petitioner's failure to raise these claims in the state courts or even the district court below. The fact that an intervening ruling by the Supreme Court, *Bell v. Cone*, supra, has severely undermined Petitioner's position on *Cronic* does not constitute cause or prejudice for his failure to raise these new claims in a timely manner. Petitioner has procedurally defaulted this claim.

II. A NEW CONSTITUTIONAL RULE MAY NOT BE ANNOUNCED ON COLLATERAL REVIEW

In *Teague v. Lane*, 489 U.S. 288, 314, 109 S.Ct. 1060, 1077, 103 L.Ed.2d 334 (1989), the Supreme Court declared that new constitutional rules of criminal procedure will not be announced on collateral review. A new rule is one which "imposes a new obligation on the states. . ." *Ibid*, 489 U.S. at 301, 109 S.Ct. at 1070. Petitioner has claimed in the Court of Appeals below that, where defense counsel has conceded elements of the offense, the trial court must

conduct an on-the-record colloquy to determine whether the defendant has consented to such a strategy. Petitioner has not cited a single case from this Court which requires either that defense counsel obtain a defendant's consent to trial strategy or that a defendant may order his trial counsel to follow a strategy which they know is not only without merit but also unethical.

On the contrary, the Court noted in *Cronic* that "the Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." *Ibid*, 466 U.S., at 657, 104 S.Ct., at 2046, fn. 19.

In *Nix v. Whiteside*, 475 U.S. 157, 175, 106 S.Ct. 988, 998, 89 L.Ed.2d 123 (1986), the Court specifically ruled that a defendant may not complain that his defense counsel was ineffective because he refused to offer perjured testimony in his defense. The State submits that, in light of the evidence adduced at trial, any defense of Petitioner's "absolute innocence" would have required similar false testimony. Haynes' recent claim of a consensual affair with his victim is simply not believable even if considered on the merits.

Specifically, Haynes' claim that he hid the victim's wallet in the wall to keep his wife from finding out about the affair is untrue and was directly disproven by testimony of police and his wife that she had already found the wallet in Haynes' car before the police arrived and had confronted her husband about it. (Exhibits, Transcript of Preliminary Examination held December 8, 1993, pp. 20-21, 26-29, Trial Transcript of October 24, 1994, pp. 79-81). Tonya Haynes told the first officers who came to her home

that she had found a brown wallet in her husband's car earlier that morning. In it were the victim's Texas driver's license and credit cards. When she confronted her husband over this strange woman's wallet, Petitioner told her that he had stolen it. When Tonya Haynes looked for the wallet to give to police she was unable to find it. Police later found it hidden in the wall of their home. (Exhibit, Vol. 1, pp. 56-58)

Petitioner also ignores another very real import of the wallet: a lover who saves a souvenir is not going to take something his amour needs in her daily life. The victim's driver's license and credit cards were in that wallet. Petitioner took those items, not as a romantic souvenir, but as a trophy of the savage rape and murder of his victim.

Moreover, no innocent explanation has been offered for the presence of torture wounds on the victim's neck and chest. Suffice it to say that the claim of an affair borders on the grotesque and no *rational* jury would have accepted it in light of the evidence. Haynes had no viable defense to his crimes and his trial counsel's strategy offered his only chance of escaping the death sentence.

Petitioner has offered no innocent explanation for these facts. Indeed, there is none. There is no reasonable explanation, no reasonable doubt. Petitioner's recent claim of a consensual relationship is demonstrably false, and would have been so determined in state court if it had been raised there.

In *Vega v. Johnson*, 149 F.3d 354, 361, (5th Cir. 1998), cert. denied, 525 U.S. 1119, 119 S.Ct. 899, 142 L.Ed.2d 899, the Fifth Circuit restated its rule that a defendant "has no right to an attorney who will docilely do as he is

told" and that a defendant has no right to "force his attorney to present his defenses."

In *Vega*, the Fifth Circuit further restated its holding in *Moreno v. Estelle*, 717 F.2d 171, 175, (5th Cir. 1983), cert. denied *sub nom Moreno v. McKaskle*, 466 U.S. 975, 104 S.Ct. 2353, 80 L.Ed.2d 826, that "if the defendant can state particular instances of disagreement . . . as to *viable* defenses, the defendant's Sixth Amendment rights . . . are *arguably* implicated." (emphasis added). In the instant case, the prisoner had no alternative *viable* defense. As every court has recognized, the evidence of Brandon Haynes' guilt was overwhelming.

Vega also observed that where a defendant expresses strong objection to his defense counsel's planned trial strategy, *Faretta* "may" require a trial court to ensure that the defendant is aware of his option to represent himself. *Vega*, at 361. It does not, however, require defense counsel to follow a defendant's idea of trial strategy.

In the instant case, moreover, where the conflict over strategy first came to the court's attention after opening statements, there was no practical way to permit self-representation without impeding "the prompt and efficient administration of justice." *Rose v. Lundy*, supra.

The State submits that Petitioner's proposal would be a new constitutional rule, and as such, cannot be announced in this matter of collateral review.

III. PETITIONER DID NOT INVOKE *FARETTA* UNEQUIVOCALLY OR TIMELY

Faretta v. California, supra, requires that a defendant who wishes to represent himself raise his claim in a timely

manner. In the instant case, although petitioner clearly expressed his opposition to his trial counsel's strategy, he did so only after their opening statement at trial, and he never stated any wish to represent himself. "Our experience has taught us that 'a pro se defense is usually a bad defense, particularly when compared to a defense provided by an experienced criminal defense attorney.'" *Martinez v. Court of Appeal of California*, 528 U.S. 152, 161, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000). In his concurring opinion below, Judge Dennis quoted *Martinez*, noting that "the right to self-representation is not absolute. The defendant must 'voluntarily and intelligently' elect to conduct his own defense, and most courts require him to do so in a timely manner." *Haynes*, 298 F.3d, at 384.

"Even at the trial level . . . the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *Martinez*, *Ibid.* Petitioner's complaints were insufficient to inform the trial court that he wished to represent himself at trial. This is hardly surprising when one considers that petitioner never articulated such a desire until his case had reached the level of the Fifth Circuit on habeas relief. The trial court cannot be faulted for failing to recognize a potential *Faretta* claim when petitioner was unable to do so until some seven years after conviction. Even if the trial court had realized what right petitioner now claims he was asserting, the beginning of a first degree murder trial is too late to indulge such an inquiry. Petitioner has waived any claim to represent himself under *Faretta*.

CONCLUSION

The State submits that Petitioner has failed to exhaust state court remedies, and has shown neither cause nor prejudice for his failure. Petitioner's failure to assert his right to self-representation before the trial court in a clear and timely manner requires its denial. Petitioner never expressed any desire to represent himself, nor is there a constitutional requirement as announced by the Supreme Court that he be informed of that right in the event of a conflict over trial strategy.

Any expansion of *Faretta* to require explicit on the record permission from a defendant before strategic concessions are made would impose a new requirement on the states. Under *Teague v. Lane*, such a new rule will not be announced on collateral review.

The State further submits that a defendant does not have an absolute right to dictate trial strategy to his defense counsel. Trial counsel made a rational decision to pursue a responsive verdict, tested the State's case at trial as to the relevant facts and, not incidentally, saved the life of their client, a vicious rapist and murderer.

WHEREFORE, the State of Louisiana, on behalf of respondent Burl Cain, prays that the application for writ of certiorari be denied.

Respectfully submitted,

PAUL J. CARMOUCHE

APPENDIX

LA. R.S. 14:30.A.(1)

Section 30. First degree murder

A. First degree murder is the killing of a human being:

> **(1)** When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, second degree kidnapping, aggravated escape, aggravated arson, aggravated rape, forcible rape, aggravated burglary, armed robbery, drive-by shooting, first degree robbery, simple robbery.

LA. C.Cr.P. ARTICLE 905.8

Art. 905.8 Imposition of sentence

The court shall sentence the defendant in accordance with the determination of the jury. If the jury is unable to unanimously agree on a determination, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

La. C.Cr.P. ARTICLE 930.8

Art. 930.8 Time limitations; exceptions; prejudicial delay

A. No application for post-conviction relief, including applications which seek an out-of-time appeal, shall be considered if it is filed more than two years after the judgment of conviction and sentence has become final under the provisions of Article 914 or 922, unless any of the following apply:

(1) The application alleges, and the petitioner proves or the state admits, that the facts upon which the claim is predicated were not known to the petitioner or his attorney.

(2) The claim asserted in the petition is based upon a final ruling of an appellate court establishing a theretofore unknown interpretation of constitutional law and petitioner establishes that this interpretation is retroactively applicable to his case, and the petition is filed within one year of the finality of such ruling . . .